

**SUMMARY**  
SOUTHEAST HYDROELECTRIC LICENSING WORKSHOP ON  
INTEGRATING STATE PROCESSES

Charlotte, North Carolina  
June 26, 2002

Participants:

Federal Energy Regulatory Commission  
North Carolina Department of Natural Resources  
South Carolina Department of Health and Environmental Control

## **SUMMARY**

### **SOUTHEAST HYDROELECTRIC LICENSING WORKSHOP ON INTEGRATING STATE PROCESSES**

The meeting for the southeast was held June 26, 2002, in Charlotte, North Carolina. Representatives from the 401 and CZM certifying agencies for North Carolina and South Carolina attended. Kentucky, Alabama, Georgia, and Florida were invited, but declined to attend. Representatives from Duke Power, Kleinschmidt, and American Rivers attended as observers. The list of individuals in attendance is attached as Appendix A.

To begin the workshop, Commission staff outlined the FERC licensing process. Staff explained the differences between the Traditional and ALP Processes, as well as FERC's requirements for Section 401 water quality certification and CZMA consistency review. Each state then explained, in some detail, their respective 401 WQC and CZMA processes.

Commission staff identified the goals of the workshop as: (1) familiarize Commission staff with participating states' WQC and CZM processes and programs; (2) familiarize states with FERC's hydro licensing process; and (3) increase efficiency of processes by (a) identifying common attributes and (b) developing potential ways to integrate processes. The following represents a synopsis of the two-day workshop.

#### **FERC LICENSING PROCESS - (Presented by Ron McKittrick)**

- Commission staff explained that the FERC is an independent agency under DOE, and is responsible for licensing the construction and operation of non-federal hydroelectric projects.
- FERC was established and derives its authority from the Federal Power Act. FERC jurisdiction over hydropower projects is affected by (a) U.S. lands, (b) navigable waters, and (c) interstate commerce.
- FERC is mandated by law to (a) give equal consideration to both developmental and non-developmental resources, (b) ensure that a hydro-power project is best adapted to the comprehensive development plan of a waterway, and (c) conduct an environmental review in accordance with the National Environmental Policy Act.

- FERC regulations stipulate that (a) FERC cannot issue a license without state water quality certification or a waiver, and (b) the water quality certificate is considered waived if not acted on within one year of the request for certification.
- If a project lies within or affects a state's coastal zone, (a) FERC cannot issue a license without a state's certification that the project is consistent with any applicable coastal zone management program, (b) CZMA requires the state to inform the Commission whether or not a project is consistent within 6 months of request.
- The Traditional Licensing Process typically takes about 5-8 years to complete, while the ALP takes about 4 years. Both licensing processes involve at least a 3-year pre-filing consultation period that begins with the issuance of an ICP (Initial Consultation Package), and is characterized by environmental studies and consultation. The Traditional Process is a rigid regulatory process, where additional information is almost always needed after an application has been filed and uncertainty as to environmental enhancements is common. The ALP is a flexible regulatory process that combines the pre-filing consultation and NEPA processes, improves communication among parties, and reduces the need for additional information as well as the uncertainty in the licensing process.
- FERC regulations require that the Section 401 WQC, request for 401 WQC, or waiver thereof, be filed along with the license application.
- An applicant for hydropower license, whose project lies within a state's coastal zone or otherwise affects the state's coastal resources, is required to file a consistency determination with the state CZM agency. The timing of this certification is not outlined in FERC's regulations, but typically an applicant files a consistency certification with the state at the time the license application is filed.
- The post-filing processing period is characterized by (a) staff's review of the license application, (b) NEPA scoping and review (includes preparing the environmental analysis), (c) several public notices and meetings, (d) additional information requests, if necessary, and (e) a 10(j) resolution process, if necessary.

### **SOUTH CAROLINA'S SECTION 401 PROCESS - (Presented by Mark Giffin)**

- South Carolina (SC) implements the 401 Water Quality Certification process through appropriate State Regulations, such as S.C. R. 61-101. These regulations allow the State to regulate hydroelectric facilities in a way that provides a reasonable assurance the water quality standards will not be contravened.
- The foundation of all Water Quality Programs are the designated uses, such as supports fishing, swimming, and suitable for the survival and propagation of a balanced indigenous aquatic community of flora and fauna. In addition the water is suitable as a source for drinking water, industrial and agricultural uses.
- During FERC Stage 1, SC Reviews the Initial Consultation Package water releases from the hydro, dissolved oxygen, temperature, and other water quality parameters. In addition, they review operation for minimum flow releases, endangered species, and navigation. They attend Interagency meeting and provide written comments.
- During FERC Stage II, SC finalizes study plans, and reviews information provided from studies. After the applicant submits an application for a 401, SC reviews application for completeness, and may require information of adjacent property owners, cubic yards of fill/excavation, etc.
- A complete application starts the 401 process and issues SCDHEC Public notice that starts the 1 year clock to issue, waive, or deny certification. The department has 180 days to issue a decision, unless waiting for information.
- Processing time includes a technical review considering all comments received and conditions for the project, such as minimum flow, sediment passage, and hydro operations addressing water quality. Coastal Zone Consistency Certification if appropriate is included. There is an appeal process and if no appeal the final certification decision is issued.

### **South Carolina's CZMA Process (Presented by Rob Mikell)**

- South Carolina certifies that the activity is consistent with the approved State coastal zone management program. The coastal zone is defined as all lands and waters in Beaufort, Berkeley, Charleston, Colleton, Dorchester, Horry, Jasper, and Georgetown Counties.
- The state or Federal permit can not be issued if CZM consistency is denied.
- The CZM consistency and 401 are integrated into 1 certification, as stated in Mark Giffin's presentation.

### **North Carolina's SECTION 401 PROCESS - (Presented by John Dorney)**

- North Carolina implements Section 401 of the Clean Water act by state regulation 15A NCAN 02H.0501. Certification is required when a discharge into a navigable waters. The state certification is verification by the state that the project will not degrade state waters or violate water quality standards.
- Certifications may be issued to individual activities (individual certification) or issued for specific type or groups of activities (general activities) FERC certifications are individual.
- An application must be filed and public noticed for 30 days. There are opportunities for hearing; however they are rare.
- The review of the application occurs when it is complete. The review is to determine if the activity will minimize adverse impacts to the surface waters based on considerations of existing uses such as, vegetation, fish and wildlife, and hydrological conditions. Also that the activity does not degrade groundwaters, or result in cumulative impacts. Some specific areas of concern are minimum flows, water temperature, and dissolved oxygen.
- All certifications shall be granted or denied within 60 days after receipt of a complete application. Failure to act within 60 days will result in waiver of the certification.

## **JOINT DISCUSSION OF INTEGRATING STATES' WQC/CZM PROCESSES AND THE FERC LICENSING PROCESS**

- South Carolina noted that they have had a good relationship with licensee's and have had few problems so far.
- South Carolina's presentation raised a potential problem. The DHEC action that triggers the state hearing process is the issuance of the Notice of Proposed Intent to issue 401/CZM certification. Actual certification can not be issued until the hearing process is complete which could potentially take years in a controversial case. Therefore, there is a question about how the Commission will interpret the "agency action" with regard to the 1-year time frame. The attendees discussed the issue and agreed that some meetings between Commission staff and DHEC staff may be useful, with perhaps a memorandum of understanding developed to clarify how the "agency action" would be interpreted.
- North Carolina wanted a reopener so changes can be made in the 401 certification.
- North Carolina noted that applicants can refile an application every 60 days to restart the 60 day processing period.
- North Carolina stated that a 401 certification can not be issued until all appeals are resolved.
- North and South Carolina suggested periodic post-filing conference calls or other such meetings. Such meetings would assist FERC, agency staff, and the licensee in staying on task during the processing of the FERC license application and 401 certifications.
- North and South Carolina state that draft license articles would reduce the need for rehearing requests and help resolve issues related to interpretation of mandatory conditions and uncertainty in compliance roles.

- North and South Carolina agree that delays in their process are the result of incomplete applications. Incomplete applications result primarily from studies that have not been completed prior to filing the license application.
- FERC's proposed issuance of a pre-NOI letter that would be sent to the applicant and provide a list of agencies to be consulted, including the CZM agency, and would identify the issues that should be considered.

## **Appendix A**

### **List of Attendees Southeast Hydropower Workshop on Integrating State Processes June 26, 2002 Charlotte, North Carolina**

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